IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5206

HARRY ROBERTS,

Petitioner,

v.

LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Supreme Court of Louisiana affirming petitioner's conviction for first degree murder and the sentence of death is reported at – La. –, 331 So.2d 11 (1976). The oral opinion of the Criminal District Court for the Parish of Orleans finding the petitioner guilty and sentencing him to death is unreported, and appears in the Appendix.

JURISDICTION

The jurisdiction of this Court to hear this matter, if such jurisdiction exists at all, would be predicated upon 28 U.S.C. §1257(3), on the grounds that petitioner has asserted below and asserts here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Louisiana was entered on March 29, 1976, rehearing refused, May 14, 1976. The petition for certiorari was filed on August 12, 1976, and was granted on November 8, 1976. The grant of certiorari was limited to one question by order of the Court on November 29, 1976.

QUESTION PRESENTED

Whether the imposition and execution of a mandatory sentence of death for the crime of the murder of a police officer under Louisiana law violates the Eighth or Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves the following provisions of the statutes of Louisiana.

La. Rev. Stat. Ann. §14:30 (1974). "*First degree murder.* First degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or

(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or peace officer who was engaged in the performance of his lawful duties; or

(3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or

(4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; [or]

(5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.

For the purposes of paragraph (2) herein, the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney or district attorneys' investigator.

Whoever commits the crime of first degree murder shall be punished by death."[1]

[1] In 1975, §14:30(1) was amended to add the crime of aggravated burglary as a predicate felony for first degree murder. Act No. 327, West's La. Sess. L. Serv. 1975, at 570-571.

In July of 1976, the Louisiana Legislature amended and reenacted §14:30, by Act 657, which reads, in its entirety, as follows:

> "*An Act to amend and reenact Part II of Title 14 of the Louisiana Revised Statutes of 1950, relative to homicide,*

(continued)

La. Rev. Stat. Ann. §14:30.1 (1974). "*Second degree murder.* Second degree murder is the killing of a human being:

(footnote continued from preceding page)

by amending and reenacting Sections 30 and 30.1 thereof, to redefine the crimes of first degree murder and second degree murder and otherwise to provide with respect thereto.

BE IT ENACTED BY THE LEGISLATURE OF LOUISIANA:

Section 1. Section 30 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

§30. First degree murder

First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation or suspension of sentence in accordance with the recommendation of the jury.

Section 2. Section 30.1 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

§30.1 Second degree murder

Second degree murder is the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.

Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation, or suspension of sentence for a period of forty years.

Section 3. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby declared severable.

Section 4. All laws or parts of laws in conflict herewith are hereby repealed.

Approved Aug. 5, 1976." West's La. Sess. L. Serv. 1976, at 1323.

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.

Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation or suspension of sentence for a period of twenty years."[2]

La. Rev. Stat. Ann. §14:31 (1974). "*Manslaughter.* Manslaughter is:

(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or

(2) A homicide committed, without any intent to cause death or great bodily harm.

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or

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[2] In 1975, §14:30.1 was amended to increase the period of parole ineligibility from twenty to forty years following a conviction for second degree murder. Act No. 380, West's La. Sess. L. Serv. 1975, at 665.

In July 1976, §14:30.1 was amended and reenacted to redefine the crime of second degree murder. See note 1, *supra*.

(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Articles 30 or 30.1.

Whoever commits manslaughter shall be imprisoned at hard labor for not more than twenty-one years."

La. Rev. Stat. Ann. §15:567 (1967). "*Conditions precedent to execution; warrant of governor.*

No person sentenced to death shall be executed until a certified copy of the indictment, verdict and sentence shall have been sent to the governor, and a warrant shall have been issued by him, under the seal of the state, directed to the warden of the Louisiana State Penitentiary at Angola, commanding the warden to cause the execution to be done on the person so condemned in all things according to the judgment against him, and upon the date named in said warrant."

La. Rev. Stat. Ann. §15:568 (1975 Supp.) "*Execution of death sentence; prior confinement of offender.*

The director of the Department of Corrections, or a competent person selected by him, shall execute the offender in conformity with the death warrant issued in the case. Until the time of his execution, the Department of Corrections shall incarcerate the offender in a manner affording maximum protection to the general public, and employees of the department, and the security of the institution."

La. Rev. Stat. Ann. §15:569 (1967). "*Place for execution of death sentence; manner of execution.*

Every sentence of death imposed in this state shall be by electrocution; that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person

convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the Louisiana State Penitentiary at Angola. Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room."

La. Rev. Stat. Ann. §15:570 (1975 Supp.). "*Officials and witnesses present at execution; minors excluded.*

Every execution of the death sentence shall take place in the presence of the warden of the Louisiana State Penitentiary at Angola, or a competent person selected by him, the coroner of the parish of West Feliciana, or his deputy, and a physician summoned by the warden of the Louisiana State Penitentiary at Angola, the operator of the electric chair who shall be a competent electrician who shall have not been previously convicted of a felony, a priest or minister of the gospel, if the convict so requests it, and not less than five nor more than seven other witnesses, all citizens of the State of Louisiana; no person under the age of eighteen years shall be allowed within said execution room during the time of execution."

La. Code Crim. Proc. Ann., art. 598 (1976 Supp.). "*Effect of verdict of lesser offense.*

When a person is found guilty of a lesser degree of the offense charged the verdict or judgment of the court is an acquittal of all greater offenses charged in the indictment and the defendant cannot thereafter be tried for those offenses on a new trial."

La. Code Crim. Proc. Ann., art. 803 (1967). "*Same [General charge; scope]; charge as to included minor offenses and plea of insanity.*

When a count in an indictment sets out an offense which includes other offenses of which the

accused could be found guilty under the provisions of Article 814 or 815, the court shall charge the jury as to the law applicable to each offense . . ."

La. Code Crim. Proc. Ann., art. 809 (1967). "*Judge to give jury written list of responsive verdicts.*

After charging the jury, the judge shall give the jury a written list of the verdicts responsive to each offense charged, with each separately stated. The list shall be taken into the jury room for use by the jury during its deliberation."

La. Code Crim. Proc. Ann., art. 814 (1976 Supp.). "*Responsive verdicts; in particular.*

A. The only responsive verdicts which may be rendered where the indictment charges the following offenses are:

1. First Degree Murder:
   Guilty.
   Guilty of second degree murder.
   Guilty of manslaughter.
   Not guilty . . ."

La. Code Crim. Proc. Ann., art. 817 (1976 Supp.). "*Qualifying verdicts.*

Any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."[3]

[3] In July of 1976, the Louisiana Legislature enacted several new articles of the Code of Criminal Procedure to provide for sentence determination in capital cases. Act 694 of 1976, which enacted these articles, reads in its entirety as follows:

"An Act to amend Title XXX of the Louisiana Code of Criminal Procedure by adding thereto a new chapter, to be designated as Chapter 3 thereof, to be composed of Articles 905 through 905.9 thereof, both inclusive, to provide with respect to sentences and sentencing procedures in capital cases, including provisions to provide that a sentence of death may be imposed only after a sentencing hearing by the jury which determined guilt; to provide with respect to rules of evidence and procedure for

(continued)

STATEMENT OF THE CASE

The petitioner was sentenced to death on September 18, 1974, in the Criminal District Court for the Parish

(footnote continued from preceding page)

such hearings; to provide that a sentence of death shall not be imposed unless the jury finds an aggravating circumstance and considers mitigating circumstances and unanimously recommends a sentence of death; to define aggravating circumstances and mitigating circumstances; to provide that the jury recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence if the jury unanimously finds the sentence of death inappropriate; to provide the form for jury recommendations; to require that the court sentence the defendant in accordance with the recommendation of the jury and that the court impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence if the jury cannot unanimously agree on a recommendation; to provide for review of a sentence of death on appeal; and otherwise to provide with respect thereto.

BE IT ENACTED BY THE LEGISLATURE OF LOUISIANA:

Section 1. Chapter 3 of Title XXX of the Louisiana Code of Criminal Procedure, to be composed of Articles 905 through 905.9 thereof, both inclusive, is hereby enacted to read as follows:

CHAPTER 3. SENTENCING IN CAPITAL CASES

Art. 905. Capital cases; sentencing hearing required

Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein.

Art. 905.1 Sentencing hearing jury; commencement

The sentencing hearing shall be conducted before the same jury that determined the issue of guilt. The order of sequestration shall remain in effect until the completion of the sentencing hearing.

Art. 905.2 Sentencing hearing; procedure and evidence

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of

(continued)

of Orleans, New Orleans, Louisiana, after having been convicted of one count of first degree murder.

(footnote continued from preceding page)

whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Art. 905.3 Sentence of death; jury findings

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

Art. 905.4 Aggravating circumstances

The following shall be considered aggravating circumstances:

(a) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery;

(b) The victim was a fireman or peace officer engaged in his lawful duties;

(c) The offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping;

(d) The offender knowingly created a risk of death or great bodily harm to more than one person;

(e) The offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) The offense was committed in an especially heinous, atrocious or cruel manner.

Art. 905.5 Mitigating circumstances

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(continued)

At trial, the State's evidence showed that on February 26, 1974, at approximately 6:20 p.m., a neighborhood argument erupted in the vicinity of 1620 Pauger

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(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance.

Art. 905.6 Jury; unanimous recommendation

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Art. 905.7 Form of recommendations

The form of jury recommendation shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

/s/ _____

Foreman"

or

"The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole, or suspension of sentence.

/s/ _____

Foreman"

Art. 905.8 Imposition of sentence

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall

(continued)

Street in the city of New Orleans. A young black man identified as being the petitioner pulled a pistol and fired approximately three shots. *Trial*, p. 4.[4] The subject then ran off down the street and around a corner. During the course of the disturbance, a child was allegedly injured by the gunfire. Neighbors then called the police to report the disturbance. *Tr.*, p. 4.

A police car of the New Orleans Police Department, with two officers, Officer John Tobin and Officer Dennis McInerney, arrived on the scene about 6:40 p.m. *Tr.*, p. 26. Persons on the scene indicated to the officers the direction in which the subject went, and the officers gave pursuit, locating the subject as he turned a nearby corner. *Tr.*, p. 27. The officers followed the subject with their emergency lights flashing up a one-way street and then around a corner to

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(footnote continued from preceding page)

impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Art. 905.9 Review on appeal

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Approved Aug. 5, 1976. West's La. Sess. L. Serv. 1976, at 1375-1377.

[4]The pagination of the record herein is erratic. The citations herein refer to the Trial Transcript, contained in Volumes II and III, with page 1 of that transcript beginning at the commencement of the trial.

South Rampart Street. There the officers pulled the police car up onto the sidewalk in front of the subject. The subject then ran over to the door on the passenger side of the police car and began shooting into the open window. *Tr.*, p. 29. Officer Tobin was hit in the leg and head. Officer McInerney, who was driving the car, stepped out of the car and in doing so, was struck in the face, sustaining a fatal injury. The subject then began to run off, while Officer Tobin shot in his direction, hitting the subject in the left leg. *Tr.*, p. 30.

Officer Tobin, with the assistance of a bystander, then radioed for assistance. Additional officers arrived on the scene, and then reported to 914 Kerlerec Street in response to a police call. *Tr.*, p. 142. This call went out at 6:41 p.m. *Tr.*, p. 133. Officers arriving at the Kerlerec address (which is about four blocks from the scene of the fatal shooting) noticed a trail of blood in front of the house at 914 Kerlerec Street. *Tr.*, p. 145. The officers followed the trail down an alleyway beside the house at 914 Kerlerec Street, in which they discovered the alleged murder weapon. *Tr.*, p. 156. The officers continued to follow the blood trail over two fences, to the rear of 918 Kerlerec Street, two houses down. The officers then found blood smears on the side door of the 918 Kerlerec residence. *Tr.*, p. 145.

Upon entering the residence at 918 Kerlerec Street, the officers noticed the defendant tending to an apparent leg wound. After a scuffle, the officers succeeded in taking the defendant into custody. *Tr.*, p. 147-148. The defendant was taken to Charity Hospital for treatment of the leg wound. While the defendant was in police custody in the emergency room at the hospital, Officer Tobin who was also there for emergency treatment identified the defendant as being the man who shot him. *Tr.*, p. 445-446.

The defendant, at trial, took the stand in his defense and testified that there was an argument at the Pauger Street location, and that in the course of the argument, a neighbor threatened to shoot him. *Tr.*, p. 287-288. He testified further that he then left the scene and began to walk to work. As he was doing so, at a point about two blocks from the scene of the fatal shooting, and also two blocks from the scene of the initial argument, he was shot in the leg from the rear by an unknown assailant. The defendant then sought refuge in the home at 918 Kerlerec Street. *Tr.*, p. 290. The defendant called his mother to come to get him, and also called the operator to request police assistance. *Tr.*, pp. 294-295.

Shortly afterward, the defendant testified, the officers entered the house and arrested him, and took him to Charity Hospital.

While at the hospital, the defendant testified, the police officers rolled Officer Tobin next to him, and that the officers indicated to Officer Tobin that the defendant was the person who shot him. *Tr.*, p. 307-308.

At the trial, the murder weapon was introduced in evidence. Two fingerprints had been successfully lifted from the pistol, and the fingerprints were identified as being those of the defendant. *Tr.*, p. 240, 244. The defendant testified that sample prints were forcibly taken from him during police interrogation. *Tr.*, p. 310-312.

The defendant was found guilty of first degree murder on August 16, 1974, by a jury composed of eleven white men and one black man. The petitioner is black, and at the time of his conviction and sentence, was nineteen years old.

HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW

On appeal to the Supreme Court of Louisiana, petitioner's Assignment of Error No. 16 asserted that "the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments; and R.S. 14:30 is unconstitutional, in that the jury is empowered to return a responsive verdict to a lesser included offense, which does not carry the death penalty."

The petitioner's case arose and was decided by the courts of Louisiana after the decision of *Furman v. Georgia*, 408 U.S. 238 (1972), and before the recent case of *Roberts v. Louisiana*, ____ U.S. ____, No. 75-5844, July 2, 1976. The statute under which petitioner was tried—La.R.S. 14:30—was amended and reenacted after *Furman*, to provide for mandatory death sentences to control the amount of discretion in sentencing vested in the jury which was disapproved by this Court in *Furman*. For this reason, petitioner's attack on the constitutionality of his death sentence was partially premised on the contention that the mandatory sentencing procedure still allowed pre-*Furman* discretion.

Petitioner's case on appeal to the Supreme Court of Louisiana was not the first case to challenge the constitutionality of La.R.S. 14:30 in that court. The question was first decided by the Supreme Court of Louisiana in *State v. Hill*, 297 So.2d 660 (La. 1974), and that decision was later affirmed in *State v. Roberts*, 319 So.2d 317 (La. 1975) and *State v. Washington*, 321 So.2d 763 (La. 1975).

With one justice dissenting as to the constitutionality of the mandatory death sentence, the Supreme Court of Louisiana affirmed petitioner's conviction and sentence, disposing of petitioner's attack on the constitutionality

of the sentence with a brief citation of decision in *State v. Hill*, supra, as being controlling. The Supreme Court of Louisiana did not decide the specific constitutionality of mandatory death sentences for the killing of police officers.

SUMMARY OF ARGUMENT

The mandatory sentence of death imposed upon the petitioner under the laws of Louisiana in existence at the time of the crime charged to petitioner is violative of the Eighth and Fourteenth Amendments in both procedure and substance. Additionally, this honorable Court lacks jurisdiction to consider the present question.

I.

There is no jurisdiction of this Court to hear the present question, for the reason that the Supreme Court of Louisiana has not rendered a final judgment—or even any judgment at all—on the specific question under consideration; that, alternatively, should jurisdiction be found to exist, this Court should decline to exercise such jurisdiction in order to allow the Supreme Court of Louisiana an opportunity to reconsider this case in light of intervening decisions; that the State of Louisiana lacks standing to defend the imposition of the mandatory death herein; and that the case is not ripe for adjudication for the reason that an important decision by the Supreme Court of Louisiana regarding the State's standing herein has not yet been made.

II.

The mandatory death sentence for the crime of the murder of a police officer under former La.R.S.§14:30 is procedurally defective in that the said law and relevant sentencing procedures did not provide for any focus by the sentencing authority on the circumstances of the particular offense. The law is further defective in that it provided no focus upon the character or propensities of the petitioner. Louisiana's statutes allowing juries to return verdicts of guilty to lesser included offenses which do not carry the death penalty, coupled with a prior lack of meaningful sentence review, also renders petitioner's sentence unconstitutional.

III.

The death sentence imposed upon the petitioner is substantively defective in that mandatory death sentences have been historically repudiated by society's "evolving standards of decency."

INTRODUCTION

On July 2, 1976, in the case entitled *Roberts v. Louisiana*, ____ U.S. ____, No. 75-5844,[5] this honorable Court decided that the mandatory death sentence therein imposed under La.R.S. §14:30 violated the Eighth and Fourteenth Amendments. The death sentence in that case was vacated, and the case was

[5] Wherever used in this brief, the citation of *Roberts v. Louisiana*, or "the *Roberts* case," refers to *Roberts v. Louisiana*, ____ U.S. ____, No. 75-5844, July 2, 1976, and not to the petitioner's case.

remanded for further proceedings. The specific act constituting first degree murder in the *Roberts* case was found in Section (1) of La.R.S. §14:30:

> "Where the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . armed robbery . . ."

In the *Roberts* case, this Court upheld the constitutionality of the death penalty *per se*, but disapproved of its mandatory application under Louisiana law. The objection was apparently based upon two interrelated grounds: the historical repudiation of mandatory death sentences, and the lack of standards to guide the jury in the application of the sentence together with a lack of meaningful appellate review of the sentence imposed.

The Court's opinion, to many informed observers, apparently invalidated the mandatory death sentence of La.R.S. §14:30 entirely. The Louisiana Legislature then amended and reenacted the statute to do away with mandatory sentencing. The amended provided for a defined set of aggravating and mitigating circumstances to guide the jury in the application of the death sentence, and also provided for appellate sentence review.[6] Mandatory death sentences, as they had existed and were applied prior to the *Roberts* decision, were legislatively abolished following that decision.

In the *Roberts* decision, the Court noted the possible validity of a mandatory death sentence in the narrow circumstance of a murder by a person serving a life sentence, or by a person previously convicted of an unrelated murder.[7] The Court noted that such a statute

[6] The new laws are set forth in footnotes 1 and 3, *supra*, pp. 3-4 and 8-12.

[7] *Roberts v. Louisiana*, No. 75-5844, July 2, 1976, *slip op.*, p. 8, n. 9.

(dealing with these two particular offenses) "defines the capital crime at least in significant part in terms of the character or record of the individual offender." It was further noted that "[a] prisoner serving a life sentence presents a unique problem that may justify such a law."[8] However, since that particular question was not presented by the facts of the *Roberts* case, it was not reached for decision by the Court.

Following the decision of *Roberts v. Louisiana*, *supra*, several Louisiana capital cases pending on petitions for certiorari were vacated and remanded, among these being the case of *Washington v. Louisiana*, ____ U.S. ____, No. 75-6123, July 6, 1976. The petitioner, Johnson Washington, was convicted under La.R.S. §14:30 of the first degree murder of a deputy sheriff.[9]

Understanding the reversal of sentence in *Washington* to be based upon the constitutional defects identified in *Roberts*, and in light of the fact that petitioner was tried under the same law and procedure apparently condemned in *Roberts* and *Washington*, the petitioner presented his objections to the previously condemned Louisiana statutes in his petition for certiorari largely as a matter of form, in the full expectation that the mandatory death sentence in his case for the crime of the killing of a police officer would be vacated, since a similar sentence for a similar crime tried under the same

[8] Ibid.

[9] *State v. Washington*, 321 So.2d 763 (La. 1975).

laws was vacated by the Court in *Washington v. Louisiana*.[10] The narrow question selected by the Court for argument herein was not presented by the petitioner,[11] nor was that particular question raised by the State in its opposition to the petition for certiorari.[12]

Further, the Supreme Court of Louisiana has not had an opportunity to consider the narrow question now being decided.[13] That court has only considered the validity of the entire statute rather than the particular validity of a given part, such as the provisions concerning the murder of a police officer.

In its opinion in petitioner's appeal, the Supreme Court of Louisiana disposed of petitioner's constitutional attack on the mandatory death sentence thus:

> "We have rejected similar attacks upon the constitutionality of the death penalty provided for first degree murder, La.R.S. 14:30, as enacted by Act 109 of 1973. See, e.g., *State v. Hill*, 297 So.2d 660 (La. 1974)."[14]

[10]On remand from this Court, the Supreme Court of Louisiana reconsidered the mandatory death sentence imposed upon Johnson Washington, and by per curiam of November 30, 1976, remanded that case to the trial court for the resentencing of Washington to life imprisonment. *State v. Washington*, ____ So.2d ____, No. 55,806 (La. Nov. 30, 1976). Thereafter, the State filed an application for rehearing in the case on December 1, 1976, citing this Court's action in petitioner's case as reason for the rehearing. *State v. Washington, supra, State's Application for Rehearing*, filed December 1, 1976. As of the date of the filing of this brief, no action on the rehearing application has been taken.

[11]See *Petition for Certiorari* herein, p. 13.

[12]"It appears that under this Court's decision in *Stanislaus Roberts v. Louisiana*, . . . this sentence cannot be carried out unless, of course, this Court grants Louisiana's Application for Rehearing and modifies its former holding." *Opposition of State of Louisiana, Respondent*, pp. 2-3.

[13]The State's Application for Rehearing in *State v. Washington, supra*, n. 10, has not been acted upon.

[14]331 So.2d 11, at 16.

In all of its considerations of the mandatory death penalty to date, the Supreme Court of Louisiana has considered only the validity of La.R.S. §14:30 as a whole, and has never ruled on the particular validity of a mandatory death sentence for one of the specific acts constituting first degree murder thereunder.

I.

JURISDICTION

In past decisions, this Court has consistently declined to decide questions which were not the subject of a final decision of the highest court of a state, when a law of a state is at issue.[15] 28 U.S.C. §1257 statutorily embodies this requirement of finality.

The question presently under review involves the constitutionality of a mandatory death sentence for the crime of the murder of a police officer. Petitioner received such a sentence, under the provisions of La.R.S. §14:30.[16] In petitioner's appeal to the Supreme Court of Louisiana, petitioner objected to the constitutionality of the mandatory death penalty *per se*, as well as to its procedural application in Louisiana.[17] The

[15]*Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co. Inc.*, 344 U.S. 178 (1952). See also the discussion of finality in an injunction case, *Local No. 438 Const. & General Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542 (1963), wherein the state judgment was final "since there was nothing more of substance to be decided in the trial court." This case is in striking counterpoint to petitioner's case, since here the very essence of the present question has never been considered by the state courts.

[16]La.R.S. §14:30 was amended and reenacted in July, 1976. See footnote 1, *supra*.

[17]*State v. Roberts*, No. 56,952, *First Supplemental Brief of Defendant-Appellant*, p. 7.

petitioner's arguments were not narrow to focus on the constitutionality of a mandatory death sentence for the particular crime with which he was charged—the murder of a police officer.[18] The state Supreme Court's approval of mandatory death sentences in the general application necessarily involved an approval of a particular application, and upon their decision that mandatory death sentences are generally valid, there was no need for that court to examine the particular validity of such a sentence for a specific class of murder. Indeed, an examination of the particular validity of a mandatory death sentence for a specific class of first degree murder, when the prohibition of such a murder is grouped together with other classes of murder in a single statute, must necessarily be predicated upon the grounds of some defect in the use of such sentences as a whole for all the acts covered by the single statute, such as the examination of a given statutory clause to determine if it is severable from an otherwise invalid statute. Since the Supreme Court of Louisiana found no such general defect in La.R.S. §14:30, that court had no reason to examine the particular validity of mandatory death sentences for those convicted of the murder of police officers.

The Supreme Court of Louisiana found petitioner's challenge of the constitutionality of his sentence to be "clearly without merit,"[19] and disposed of the challenge

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[18]Similarly, in *State v. Roberts*, 319 So.2d 317 (La. 1975), decided here *sub nom Roberts v. Louisiana*, ____ U.S. ____, No. 75-5844, July 2, 1976, the Supreme Court of Louisiana decided the constitutionality of the death sentence in all applications, and not for the specific act therein involved, i.e., a murder in the course of an armed robbery.

[19]331 So.2d 11, at 15.

in one sentence.[20] Petitioner's appeal was the second mandatory death penalty case considered by that court which involved the murder of a "peace officer,"[21] and neither opinion dealt with the specific constitutionality of a mandatory death sentence for the particular crime involved.

Petitioner's appeal was decided and rehearing thereon was refused by the Supreme Court of Louisiana prior to this Court's decision in *Roberts v. Louisiana, supra*, and the state Supreme Court has not had an opportunity to reconsider the particular validity of a mandatory death sentence in petitioner's case, in light of the intervening decision in *Roberts*.

It is clear that the present question here under review has *not* been ruled upon by a lower state court in petitioner's case, or even in any other Louisiana case.[22] This Court has consistently held that if an issue was not presented to state courts in such a manner that it was

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[20]"We have rejected similar attacks upon the constitutionality of the death penalty provided for first degree murder, La.R.S. 14:30, as enacted by Act 109 of 1973." 331 So.2d, at 16. This summary rejection of petitioner's claim without elaboration provoked a separate concurrence by Associate Justice Summers. See 331 So.2d, at 16.

[21]La.R.S. §14:30(2) defined as first degree murder carrying a mandatory death penalty the case of the killing of a human being "when the offender has a specific intent to kill or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties." The first case involving the murder of a "peace officer" (therein, a deputy sheriff), was *State v. Washington*, 319 So.2d 763 (La. 1975); *on writ, rev'd*, ____ U.S. ____, No. 75-6123, July 6, 1976.

[22]The other Louisiana case involving the murder of a peace officer, *Washington v. Louisiana, supra*, footnote 10, is still pending on the State's application for rehearing in the Supreme Court of Louisiana as of the date of the filing of this brief.

necessarily decided below, the Court would have no power to consider the issue. *Street v. New York*, 394 U.S. 576 (1969); *Hill v. California*, 401 U.S. 797 (1971); *Monks v. New Jersey*, 398 U.S. 71 (1970); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). The only distinguishing feature between the cited cases and that of the petitioner is that in the cited cases, the issues were raised for the first time on certiorari by the petitioner, whereas in the present case, the issue under consideration was raised by the Court *sua sponte*. Nevertheless, the rule of no review where the issue was not raised below should not be made dependent on the method in which the issue is presented to the Court: the determinative fact is the lack of lower court decision, and not the mode of presentation of the issue. The fact is inescapable that the Supreme Court of Louisiana has not decided the question, and for this reason, under past decisions of this Court, there is no power to decide the present issue.

Particularly interesting and possibly applicable here is this Court's actions in two sets of cases, both of which involved the lack of state review of cases following the decision by this Court if issues affecting the said cases. The first set involved *Norris v. Alabama*, 294 U.S. 587 (1935), and *Patterson v. Alabama*, 294 U.S. 600 (1935). In *Norris*, a jury make-up was found to be defective by the Court, and the case was remanded. In *Patterson*, the companion case to *Norris*, the defendant had failed to reserve the error of jury make-up, and the Alabama court refused to consider the claim on appeal. Nonetheless, this Court reversed *Patterson* as well and remanded the case, believing that the state court might have viewed Patterson's claim differently had it known that the constitutional objection was valid. The *Norris* case was found in *Patterson* to have intervened between the decision of Patterson's case on appeal and its later

consideration on certiorari. The remand was ordered to that the Alabama court could take cognizance of the intervening *Norris* decision. The action in Patterson is consonant with the rule previously discussed of the abstention of deciding issues not decided in state court. In *Patterson*, though the failure of the state court to consider Patterson's claim would not operate as a bar to review on certiorari,[23] the Court decided to permit Alabama's courts a chance to pass upon the issue.

The *Patterson* principle was followed in *Williams v. Georgia*, 349 U.S. 375 (1955). In *Williams*, another jury selection process was involved which was condemned by this Court in *Avery v. Georgia*, 345 U.S. 559 (1953). *Avery* was decided two months after Williams' trial. The Georgia Supreme Court refused to consider Williams' objections founded upon the *Avery* decision, despite the fact that both cases arose and were tried in the same county and under the same condemned procedure, on the procedural grounds of Williams' failure to make timely objection to the jury make-up. Since Williams' case did not, like *Patterson*, involve a decision by this Court which *followed* state appellate determination, the Court found that it had jurisdiction, but nonetheless *declined* to exercise the jurisdiction until Georgia had a chance to decide the question. *Williams* was therefore reversed and remanded for the consideration of the federal question.

The *Patterson* principle is particularly applicable here, even more so than in *Williams*, since here, unlike *Williams*, a decision by this Court crucial to the issue intervened between state appellate determination and consideration on certiorari. *Roberts v. Louisiana, supra,*

[23] See *Henry v. Mississippi*, 379 U.S. 443 (1965), wherein the Court held that state procedural rules, specifically those which bar appellate consideration of errors unreserved at trial, are not to be allowed to bar vindication of important federal rights.

was reversed and remanded due, among other things, to a defect in Louisiana's responsive verdict scheme.[24] Just as *Patterson* was tried under the same defective procedure as *Norris*, so was the petitioner tried under the same responsive verdict scheme disapproved by the Court in *Roberts*. Further, as in *Patterson*, the state court did not consider the *Norris* defect in Patterson's state appeal, so has the Supreme Court of Louisiana failed to consider petitioner's sentence in light of the procedural defects identified in *Roberts*. Since the Louisiana Supreme Court has not had an opportunity to reconsider its ruling in petitioner's case in light of this Court's decision in *Roberts v. Louisiana*, this case, like *Patterson*, should be remanded for consideration in light of the intervening decision.

A further objection to the Court's consideration of this matter involves a question of standing, as well as a question of the ripeness of the issues which would allow a determination of standing. The standing problem here is essentially whether the State of Louisiana, by virtue of the recent acts of its Legislature, has any standing whatsoever to defend the imposition of the mandatory death sentence upon the petitioner.

An examination of the legislative history of La.R.S. §14:30 is essential to a clear understanding of the standing problem. Prior to this Court's decision in *Furman v. Georgia, supra,* Louisiana had no distinction between first and second degree murder, and encompassed all killings involving specific intent as well as certain felony murders.[25] La.R.S. §14:30 prior to *Furman* provided only for a death sentence upon conviction; however, La. Code Crim. Proc. Art. 817 allowed for jury qualification of its verdict as "Guilty

[24] *Roberts v. Louisiana, supra, slip op.*, pp. 8-9.

[25] La. Acts 1942, No. 43, §1, Art. 30.

without capital punishment."[26] Accordingly, all persons convicted of murder were sentenced either to death or to life imprisonment, at the unguided decision of the jury. In obvious response to the *Furman* decision, the Louisiana Legislature amended and reenacted La.R.S. §14:30, and enacted La.R.S. §14:30.1 to provide for first and second degree murder, providing that conviction of first degree murder would carry a mandatory death sentence, and taking away the jury's power to qualify the verdict. The legislative Act which accomplished this change included therein as Section 2 the following provision:

> "This Act shall not apply to any crime committed before the effective date of this Act. Crimes committed before that time shall be governed by the law existing at the time the crime was committed."[27]

Act 109 became effective on July 2, 1973, and was in effect at the time petitioner's crime was allegedly committed.

In July 1976, in response to this Court's decision in *Roberts v. Louisiana, supra,* the Louisiana Legislature amended and reenacted La.R.S. §14:30 to eliminate the mandatory death sentences, and to make the imposition of the death sentence a matter of the trial jury's finding a statutorily defined aggravating circumstance.[28] The 1976 legislation, set forth in its entirety in footnotes 1 and 3, *supra*, contained no provision identical or even similar to Section 2 of Act 109 of 1973, quoted above. Section 2 is generally known as a "saving clause," which preserves criminal liability in the

[26] La. Code Crim. Proc. Ann, art. 817 (1967).

[27] La. Acts 1973, No. 109, §2.

[28] See footnotes 1 and 3, *supra.*

event of an express or implied repeal of an earlier criminal statute. Act 657 of 1976 has no such saving clause, such as Section 2 of Act 109 of 1973. Act 657 further provides that "all laws or parts of laws in conflict herewith are hereby repealed."[29] It is the earnest contention of the petitioner that La.R.S. §14:30 as it existed before the 1976 amendment is in conflict with the statute following the amendment; that due to this conflict, the two laws cannot co-exist; and the latter law has therefore *expressly* repealed the former. Due to the absence of a saving clause, there is no criminal liability now existing on the part of the petitioner as regards first degree murder. Act 657 of 1976 went into effect on or about October 2, 1976, after petitioner had filed his petition for certiorari. This is now the first time that petitioner has raised the issue of the lack of the standing clause; but it is here presented to the Court not for decision, but in the hope of showing that the standing of the State to defend the sentence imposed upon the petitioner is in serious question. The effect of a lack of a saving clause is essentially a matter of state law, but prior decisions of the Supreme Court of Louisiana, although not in cases involving such a serious penalty, have held that the lack of a saving clause releases criminal liability. See, e.g., *State v. Bienvenu*, 207 La. 859, 22 So.2d 196 (1945); *State v. Thomas*, 149 La. 654, 89 So. 887 (1921).

If Louisiana law does not provide for any continued criminal liability on the part of petitioner for the first degree murder, then certainly the State has no standing to insist upon such liability before this Court. But coupled with this lack of standing is the problem of

[29]West's La. Sess. L. Serv. 1976, p. 1323.

ripeness of the standing issue for adjudication. Since the effect of a lack of a saving clause is largely a matter of state law,[30] the Supreme Court of Louisiana should be first given the chance to determine what effect the 1976 legislation had upon prior criminal liability. A decision of the effect of the legislation by this Court which upholds criminal liability, prior to the decision of that question by the Supreme Court of Louisiana, may render the ultimate decision reached in this case an advisory opinion, in the event that the Louisiana Supreme Court finds no continuing criminal liability as a matter of state law. For this reason, there is an issue herein which has not been decided below, and which may make the decision of the ultimate issue herein an advisory opinion.

Here are presented two objections to this Court proceeding toward a disposition on the merits herein: the doctrine of declining to decide issues not passed upon below (previously discussed herein), and the doctrine of abstention from the decision of federal questions where the case may be disposed of on questions of state law. Bearing in mind that a decision by this Court on the merits may be displaced by a decision of the Louisiana Supreme Court against continuing criminal liability, the wisdom of the abstention doctrine enunciated by a unanimous Court in *Texas v. Pullman Co.*, 312 U.S. 496 (1941) becomes clear:

> "In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." 312 U.S., at 500.

[30]Petitioner does not discount the possibility that a federal question may arise in the course of the Louisiana Supreme Court's determination of the issue.

Since the question presently being considered was not ever decided by the Supreme Court of Louisiana, the issue was not the subject of a final judgment of a state court, thereby precluding this Court from exercising jurisdiction under 28 U.S.C. §1257. Due to this lack of jurisdiction, the writ should be dismissed. Alternatively, should jurisdiction be found to exist, this case should be remanded to the Supreme Court of Louisiana to allow that court an opportunity to reconsider petitioner's case in light of the *Roberts* decision and the procedural defects noted therein by the Court. In the further alternative, the case should be remanded to the Supreme Court of Louisiana to allow that court a chance to pass upon the effect of a lack of a saving clause in the 1976 legislation, for the reason that the State's standing to defend the mandatory death sentence is now drawn into serious question, and that question should be resolved at the state level.

II.

PROCEDURAL OBJECTIONS TO LOUISIANA'S APPLICATION OF MANDATORY DEATH SENTENCES FOR THE MURDER OF A POLICE OFFICER.

The question under consideration cannot be divorced from its procedural application and considered solely in the abstract: for this Court to consider the intrinsic constitutionality of Louisiana's mandatory death sentence for a given class of first degree murder, there must be no statutory procedural defects sufficient to decide the case. In the presence of such a defect, there would be no reason to reach the issue of the inherent constitutionality of the mandatory death sentence, and any discussion of the ultimate issue after a disposition

on procedural grounds would be merely an advisory opinion.

This Court has consistently adhered to the policy of avoiding the decision of unnecessary constitutional questions. This policy was articulated in Justice Brandeis' concurrence in *Ashwander v. TVA*, 297 U.S. 288, at 346-348 (1936), and has been consistently followed since.[31]

A recent instance of the application of the *Ashwander* doctrine may be found in *Furman v. Georgia, supra.* There, three of the majority declined to reach the issue of the constitutionality *per se* of the death penalty, and limited the disposition of the case to procedural grounds. Of these three justices, Justice Stewart specifically cited the Brandeis concurrence in *Ashwander* as justification for declining to reach the ultimate question.

If this doctrine is to be applied in the petitioner's case, the existence here of a procedural flaw in the imposition of the mandatory death sentence would make a decision of the ultimate question unnecessary.

In *Roberts v. Louisiana, supra,* this Court did not conclude that mandatory death sentences were invalid in all applications;[32] rather, the Court found the mandatory death sentences under Louisiana law defective in application:

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[31] *Hillsborough v. Cromwell*, 326 U.S. 620, 629-630 (1946); *Dandridge v. Williams*, 397 U.S. 471, 475-476 (1970); *Hagans v. Lavine*, 415 U.S. 528, 549-550 (1974); *Mayor of City of Phila. v. Educational Equality League*, 415 U.S. 605, 629 (1974).

[32] See *Roberts v. Louisiana, supra, slip op.*, p. 8, n. 9, wherein the question of a mandatory death sentence for murder committed while serving a life sentence was not reached. See also, *Woodson v. North Carolina*, ____ U.S. ____, No. 75-5491, July 2, 1976, *slip op.*, pp. 5-6, n. 7, 10-11, n. 25.

> "The constitutional vice of mandatory death sentence statutes–lack of focus on the circumstances of the particular offense and the character and propensities of the offender–is not resolved by Louisiana's limitation of first-degree murder to various categories of killings." *Slip op.*, p. 7.

Left open by the Court was the narrow question of the validity of mandatory death sentences by those convicted of a previous unrelated murder, or by a person serving a life sentence.[33] The reason given for excluding this particular class of murder from the objections in *Roberts* was that the excepted category ". . . defines the capital crime at least in significant part in terms of the character or record of the individual offender,"[34] i.e., that this particular crime provided some significant focus on the character or record of the individual offender which was found lacking in the definitions of other first degree murders. The definition as first degree murder of murder by one previously convicted of an unrelated murder, and by one serving a life sentence, was contained in La.R.S. §14:30(3).

The provision of La.R.S. §14:30 which dealt with the murder of police officers was not singled out by the Court for exception from the *Roberts* decision. One might assume that the mandatory death sentence for the murder of a police officer was not excepted from the *Roberts* decision, as may be evidenced by this Court's action in reversing the sentence of one convicted of killing a deputy sheriff in *Washington v. Louisiana*, ____ U.S. ____, No. 75-6123, July 6, 1976; *reh'g den.*, October 4, 1976. In the *Washington* case, the petitioner therein was tried under the same clause of La.R.S. §14:30 as was the instant petitioner, and

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[33] *Roberts v. Louisiana, supra, slip op.*, p. 8, n. 9.

[34] Ibid.

the same procedural laws governing the trial of the cases were followed.[35]

Should the *Washington* case not be sufficient to indicate procedural flaws in Louisiana's imposition of mandatory death sentences upon persons convicted of the murder of police officers, a consideration of the statutory definition of such a crime will show that the definition does not meet the *Roberts* criterion of being defined "at least in significant part in terms of the character or record of the individual offender."[36]

The definition of murder involving a prisoner serving a life sentence, or involving a person previously convicted of an unrelated murder necessarily implies that the offender brought within the statutory definition has either committed a prior murder, or, at the very least, has been convicted of a serious offense. The statutory definition justly assumes a history of serious crime. For the State to prove its case under such a definition, proof must be offered of the prior offenses. Without such proof, a case for first degree murder could not be established and the offender could not be found guilty on the first degree murder charge which carries the death penalty. In other jurisdictions, this focus on the past record of the accused is one method of imposing the death sentence which was approved by this Court in *Gregg v. Georgia*, ____ U.S. ____, No. 74-6257, July 2, 1976, and *Proffitt v. Florida*, ____ U.S. ____, No.

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[35] See also *Green v. Oklahoma*, ____ U.S. ____, No. 75-6451, July 6, 1976, which also involved a mandatory death sentence for the killing of a police officer, in which the death sentence was also vacated, and the case remanded for further proceedings in light of *Roberts v. Louisiana* and *Woodson v. North Carolina, supra*, footnote 32.

[36] See footnote 33, *supra*.

75-5706, July 2, 1976.[37] In these jurisdictions, the focus on the record of the accused takes place in a special sentencing hearing, with the record of the accused possibly being used by the prosecution to show an "aggravating circumstance" warranting the imposition of the death sentence.

The focus implicit in the definition of murder committed by one serving a life sentence or of murder committed by one previously convicted of an unrelated murder was perhaps the reason for the Court's exception of such a class of murder from its objection in *Roberts* to Louisiana's mandatory death sentences, since such focus had proved sufficient in *Gregg* and *Proffitt*, although in the latter cases, the focus occurred in separate sentencing hearings.

[37]Ga. Code Ann., §26-3102 (1975 Supp.), provides that the sentence will be life imprisonment unless the jury at a separate evidentiary hearing immediately following the verdict finds unanimously and beyond a reasonable doubt that at least one statutory aggravating circumstance exists. §27-2534.1(b) includes as an aggravating circumstance the situation where the offense "was committed by a person with a prior record of conviction for a capital felony, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions."

In Florida, a similar evidentiary hearing is held to determine the existence of any aggravating circumstances. Fla. Stat. Ann. §921.141(6) (Supp. 1976-1977) provides as an aggravating circumstance the situations where "the capital felony was committed by a person under sentence of imprisonment," and "the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."

Under present Louisiana law, La. Code Crim. Proc. Ann., art. 905.4(c) and (f) encompass as aggravating circumstances the situations of murder by one previously convicted of an unrelated murder, and murder by one serving a life sentence. See footnote 3, *supra*.

The instant question is whether the crime of the murder of a police officer may, consistent with the rationale of the footnoted exception in *Roberts*, be also excluded from the objections of *Roberts*. In the case of one serving a life sentence, it may be conclusively presumed that the accused has been previously convicted of a rather serious crime. It may not be so presumed that everyone convicted of the murder of a police officer has also been previously convicted of another serious crime: there is nothing whatsoever to preclude a person without a criminal record from committing the murder of a police officer as a first offense. This hypothetical situation may be unlikely, but it is not impossible.

The failure of La.R.S. §14:30(2) to address itself to the character or record of the offender, as does the footnoted exception in *Roberts*, then La.R.S. §14:30(2) must come within the objections noted in *Roberts* rather than within the exception.

However, the objections noted in *Roberts* extended beyond the failure of Louisiana's mandatory death sentence statute to focus on the character or propensities of the accused:

> "Louisiana's mandatory death sentence also fails to comply with *Furman's* requirement that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences." *Slip op.*, p. 8.

Louisiana had in effect at the time of petitioner's trial (as well as at the time of the trial of Stanislaus Roberts) a responsive verdict procedure which was found in *Roberts* to lack standards to guide the jury in selecting among first degree murderers, since any jury which felt the death sentence inappropriate for a given defendant, could avoid the imposition of the death sentence by returning a guilty verdict to a lesser

included offence which did not carry the death penalty, even though there was no evidence whatsoever to support the lesser offense. Further, the Supreme Court of Louisiana had no power to correct such jury nullification. The Court found that such a procedure "... invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate."[38] There is no difference whatsoever in the responsive verdict procedure applied in petitioner's case and that procedure condemned in *Roberts*, and there is no reason to distinguish the cases.

For the reason that Louisiana's mandatory death sentence for the murder of a police officer does not define the crime in terms of the character or record of the accused; for the reason that the statutory definition of first degree murder does not provide any focus on the circumstances of the particular offense; and for the reason that the responsive verdict procedure condemned in *Roberts v. Louisiana, supra,* was in full operation in the petitioner's case, the Court should decline to reach the constitutionality of mandatory death sentences in the general application for the crime of the murder of a police officer, and instead vacate the petitioner's sentence on the procedural grounds identified in *Roberts.*

III.

SUBSTANTIVE DEFECTS IN MANDATORY DEATH SENTENCES FOR THE MURDER OF POLICE OFFICERS.

In *Roberts v. Louisiana, supra,* the Court concluded that mandatory death sentences for murder, as applied

[38]*Roberts v. Louisiana, supra, slip op.*, p. 9.

via former La.R.S. §14:30, were defective both procedurally and substantively.[39] The Court found that:

> "Louisiana's mandatory death sentence law employs a procedure that was rejected by that State's legislature 130 years ago and that subsequently has been renounced by legislatures and juries in every jurisdiction in this nation. The Eighth Amendment ... simply cannot tolerate the reintroduction of a practice so thoroughly discredited." *Slip op.*, at p. 10. (footnotes and citations omitted).

The Court in *Roberts* went beyond mere procedural defects and reached the conclusion that mandatory death sentences, with the express exception of those imposed on persons serving life sentences or persons convicted of prior unrelated murders, were cruel and unusual punishment under the Eighth Amendment as applied to the states via the Fourteenth. In light of this Court's action in reversing the mandatory death sentence imposed under Louisiana law for the murder of a deputy sheriff in *Washington v. Louisiana,* ____ U.S. ____, No. 75-6123, July 6, 1976; *reh'g den.*, October 4, 1976, it is apparent that the Eighth Amendment

[39]The procedural defects noted were lack of focus on the character of the accused and on the circumstances of the particular offense, as well as the defective responsive verdict procedure which allowed arbitrary jury avoidance of the death sentence. These defects were discussed in the previous section.

In *Woodson v. North Carolina,* ____ U.S. ____, No. 75-5491, the Court dealt with mandatory death sentences in more elaborate detail, and at the conclusion of an Eighth Amendment examination of the practice, found that "... one of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense." ____ U.S. ____, 96 S.Ct. 2978, 2990.

prohibition in *Roberts* applied to Louisiana's mandatory death sentence for the murder of police officers as well.

There are absolutely no facts or law upon which to distinguish petitioner's case from that of Johnson Washington. Both defendants were tried under La.R.S. §14:30(2); the responsive verdict scheme of La. Code Crim. Proc. Ann., art. 814 was applicable in both cases. The "peace officer" murdered in Washington's case was a deputy sheriff; in petitioner's case, a city policeman. In the absence of a distinguishment of the two cases, a result in petitioner's case contrary to that in *Washington v. Louisiana, supra,* simply cannot be reached without the overruling of *Washington.*[40] Such an unprecedented and unwarranted action would mean that mandatory death sentences for the murder of police officers was cruel and unusual punishment violative of the Eighth Amendment from the date of the issuance of the mandate to the date of a contrary decision in this case. Such a constitutional curiosity would give short shrift to the concepts of *stare decisis*, in light of an apparent shift in position in *less than one year.* Petitioner has no need to develop a "parade of horribles" which would result from a change of course. Such an argument was eloquently and succinctly stated by the Chief Justice in his dissent in *Furman v. Georgia*, 408 U.S. 238 (1972):

> "All of the arguments and factual contentions accepted in the concurring opinions today were considered and rejected by the Court one year ago. . . . [t]he Court entered its judgment, and if *stare decisis* means anything, that decision should be regarded as a controlling pronouncement of

[40] *Green v. Oklahoma,* ____ U.S. ____, No. 75-6451, July 6, 1976, would probably also have to be overruled, since it also involved a mandatory death sentence for the murder of a policeman. See footnote 35, *supra.*

> law. * * * It may be thought appropriate to subordinate principles of *stare decisis* where the subject is as sensitive as capital punishment and the stakes are so high, but these external considerations were no less weighty last year. This pattern of decisionmaking will do little to inspire confidence in the stability of the law." 408 U.S., at 399-400.

Further, the re-approval of a punishment previously declared cruel and unusual by the Court is without precedent. The precedented mode of reintroducing a punishment declared cruel and unusual by a court has been via constitutional amendment, as was the California experience following the decision of *People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880 (1972). Such a course was envisioned as the only alternative by Justice Powell in his dissent in *Furman v. Georgia, supra*:

> "Nothing short of an amendment to the United States Constitution can reverse the Court's judgments. * * * The sobering disadvantage of constitutional adjudication is the universality and permanence of the judgment." 408 U.S., at 462.

The mandatory death penalty has been declared to be cruel and unusual punishment in violation of the Eighth Amendment, with one exception not yet reached for decision. That exception does not include the petitioner's case. The Court should not take the unwarranted and totally unprecedented step of reversing an Eighth Amendment adjudication that has not yet even made its way into the bound volumes of the United States Reports. The substantive ruling of *Roberts* and *Washington* should be followed, and the petitioner's sentence vacated and the case remanded for further proceedings.

CONCLUSION

Since the Supreme Court of Lousiana has not made a final ruling on the question under review, there is no jurisdiction of this Court to entertain the present question, and the writ should be dismissed. Alternatively, should jurisdiction be found to exist, the Court should refrain from the present exercise of jurisdiction, and instead remand the case for consideration of the present question as well as for consideration of the effect of the lack of a saving clause in the 1976 legislation affecting first degree murder.

Louisiana's application of mandatory death sentences for the crime of first degree murder has previously been condemned by this Court; and since the petitioner was tried, convicted and sentenced under this invalid procedure, his sentence should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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